APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED FEBRUARY 23, 2007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1398

NOURI E. HAKIM,

Plaintiff-Appellant,

v.

CANNON AVENT GROUP, PLC, CANNON RUBBER LIMITED AND AVENT AMERICA, INC.,

Defendants-Appellees.

JUDGES: Before MICHEL, Chief Judge, NEWMAN and RADER, Circuit Judges.

NEWMAN, Circuit Judge.

Mr. Nouri E. Hakim sued Cannon Avent Group, PLC, Cannon Rubber Limited, and Avent America, Inc. (together "Avent") in the United States District Court for the Western District of Louisiana, asserting infringement of Hakim's United States Patents No. 6,321,931 (the 2931 patent) and No. 6,357,620 (the 2620 patent), by Avent's leak-resistant drinking cups. The district court granted Avent's motions for summary

judgment that the 2931 patent is not infringed and the 2620 patent is invalid.[1] We affirm these judgments.

THE *'931 PATENT*

The Hakim inventions are for drinking cups that prevent the spilling of liquid if the cup is tipped over. Hakim's patented cups have a valve through which fluid can pass when suction is applied by a person by way of a drinking spout, whereby the valve closes to seal the cup when a person is not drinking. The specification of the '931 patent describes the preferred embodiment as having a dual sealing mechanism that provides an "extremely secure seal" against spillage:

> In accordance with the invention, an improved cup construction and valve assembly is provided which provides an extremely secure seal against accidental liquid flow from the cup spout. Further to the invention, a user places his or her mouth against the spout of the cup assembly to suck liquid out of the cup when desired. The act of sucking at the spout of the cup creates negative pressure or a partial vacuum against a valve in the cup spout, causing the valve to invert, or turn inside out, either partially or totally, thereby unblocking an opening such as an orifice or slit

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1. *Hakim v. Cannon Avent Group, PLC*, No. 3-02-1371, 2005 WL 1793760 (W.D.La. May 4, 2005) (the 2931 patent) ("*Hakim I*"); *Hakim v. Cannon Avent Group, PLC*, No. 3-02-1371, 2005 WL 1793765 (W.D.La. May 4, 2005) (the 2620 patent) ("*Hakim II*").

in the valve. Once the opening is unblocked, liquid can flow freely through the valve and spout.

In contrast, when not in use, the valve sits in a resting, closed position, with the valve pressed against the center seal-off, thereby sealing off the opening or slit in the valve assembly. Thus, in its relaxed state, with no negative pressure applied, the valve sits in a closed position with the fluid opening sealed by the center seal-off. Moreover, in accordance with the dual valve nature of the device in the preferred embodiment, an adjacent valve similarly seals when no negative pressure is applied, thereby blocking off the air vents in the cover of the cup, and further preventing the possibility of fluid flow. Consequently, the closed position provides an extremely secure seal against fluid leakage, such that inadvertent spills or even deliberate attempts to force liquid outside of the cup, such as by turning the cup upside down, or shaking the cup, are ineffective.

'*931 Patent*, col. 1, line 51 to col. 2, line 10.

During patent prosecution Hakim described his distinctions from the cited references as follows:

Thus two separate mechanisms are both used to close off the passage of liquid through the valve when not in use. The first mechanism involves an inverting, *flexible valve material which has a slit* therein and responds to suction. The second

> mechanism involves the use of a blocking element, which is impenetrable to the passage of liquid. The slit sits against the blocking element, sealing or blocking off the slit, to yet further prevent the passage of liquid through the valve.
>
> . . . . By providing *both the elastomeric member with a slit and a blocking element,* a sealing mechanism is provided which reduces spillage beyond that of either mechanism alone. None of the references cited in the Office Action [Robbins III, Bachman, and Belcastro] teach or suggest such *a no-spill mechanism having a slit sitting against a blocking element such as is recited in all of the pending claims.*

'931 Application Response, Oct. 2, 2000 (emphases added). Thus during prosecution the presence of the slit in the flexible valve material was emphasized as distinguishing all of the claims from the cited references.

Avent's accused drinking cup has a valve with a flexible diaphragm having a central opening, but the opening is not a slit that opens and closes, but simply a hole in the diaphragm. The diaphragm rests against a plastic mount that has a conical head that seals the hole. Upon suction by a person seeking to drink, the diaphragm is lifted off the conical head, exposing the hole and permitting fluid to flow from the cup to the drinking spout.

The district court held on summary judgment that Avent's device did not infringe the '931 claims, based on the claim

construction that limited the 2931 claims to a sealing mechanism that includes a flexible valve material or diaphragm having a slit. *Hakim I* at *1 ("For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after a de novo review of the entire record and the written objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law"; summary judgment was granted.) Mr. Hakim argues that the claim construction is excessively constricted and that all of the '931 claims do not require a slit that opens and closes with pressure, for claims 1 and 2 use the word "opening," not "slit," for the aperture in the diaphragm. Claim 1 is as follows:

> 1. An apparatus for use in a no-spill drinking cup, said apparatus comprising:
>
> a valve holder, such valve holder comprising at least one valve and a blocking element, said valve comprising a flexible material, said blocking element comprising an area of material which is impenetrable to the flow of liquid, said valve further comprising *an opening through said flexible material,* said valve having a resting position wherein said flexible material sits with said opening against said blocking element such that said valve is closed to the passage of liquid through said valve, said valve moving into an open position for the passage of liquid through said valve upon the application of negative air pressure to the top of said valve, said open position being a position wherein said flexible member

comprising said opening lifts off of said blocking element.

(Emphasis added.) The word "opening" was placed in claims 1 and 2 when Hakim filed a continuation application after receiving a notice of allowance for claims wherein the word "slit" appeared instead of "opening." The filing of the continuation was accompanied by an attorney letter stating that Hakim was broadening claims 1 and 2, and an amendment changing "slit" to "opening" in claims 1 and 2. The continuation claims were allowed without any comment or rejection by the examiner. However, in construing the claims of the continuation patent, the district court held Hakim to his arguments in the parent application that the invention includes the presence of a slit in the flexible material. The court stated: "Because Hakim did not retract any of his arguments distinguishing the prior art, he is held to the restrictive claim construction he argued during prosecution of the patent." *Hakim I* at *5 (adopted Magistrate's Report).

Hakim argues that the district court improperly relied on the argument in the abandoned parent application. Hakim states that by re-filing the application with broader claims, he avoided any unnecessary restriction that may have crept into the prior prosecution. He states that he informed the examiner that the new claims were broader than those previously allowed, and that when the examiner allowed the new claims without rejection, there is a presumption that the examiner had assured himself of the patentability of the new claims. *See United States v. Chemical Foundation,* 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926) ("The presumption

of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") Hakim states that he did what was appropriate when he flagged this change to assist the examiner, and that the claims as granted should not be unnecessarily narrowed by the court.

Avent states that the totality of the prosecution history nonetheless limits Hakim to the embodiment with the slit, for the magistrate judge found: "The prosecution history makes perfectly clear that Hakim specifically distinguished his invention from the prior art by limiting it to an apparatus with both (1) a slit which closes when suction is not applied, and (2) a second closure consisting of a blocking element which the slit rests against." *Hakim I* at *5 (adopted Magistrate's Report). Avent states that this was and is the distinction from the prior art, and that the claims are properly limited to this feature whether they use the word "slit" or the word "opening." Avent stresses that when Hakim wrote to the examiner that he was broadening the claims, he did not specifically point out that he no longer intended to be limited to the specific mechanism that he had previously argued was the distinguishing feature of his invention.

Hakim points out that a patent applicant is not precluded from filing a continuation application with broader claims. It is recognized that an applicant can broaden as well as restrict his claims during the procedures of patent examination, and that continuing applications may present broader claims than were allowed in the parent. *Cf. Symbol Technologies, Inc. v. Lemelson Medical, Education &*

Research Found., 422 F.3d 1378, 1385 (Fed.Cir.2005) ("Commonly, and justifiably, one might refile an application to add subject matter in order to attempt to support broader claims as the development of an invention progresses, although entitlement to an earlier filing date for any claimed subject matter may of course be necessary to avoid a statutory bar created by intervening events outlined in 35 U.S.C. §§ 102 and 103.").

Hakim had the right to refile the application and attempt to broaden the claims. *See id.* at 1385 ("One may also refile an application even in the absence of any of these reasons [refiling an application in response to a requirement for restriction; refiling in order to present evidence that may not have previously existed; or refiling to support broader claims as the development of an invention progresses], provided that such refiling is not unduly successive or repetitive.") However, an applicant cannot recapture claim scope that was surrendered or disclaimed. The district court did not err in holding that the examiner's action in allowing the continuation claims without further prosecution was based on the prosecution argument in the parent. *See Omega Engineering, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed.Cir.2003) ("The doctrine of prosecution disclaimer is well established in Supreme Court precedent, precluding patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.") (citing *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 220-21, 61 S.Ct. 235, 85 L.Ed. 132 (1940), *Crawford v. Heysinger*, 123 U.S. 589, 602-04, 8 S.Ct. 399, 31 L.Ed. 269 (1887), and *Goodyear Dental Vulcanite Co. v. Davis*, 102 U.S. 222, 227, 26 L.Ed. 149 (1880)). Although a disclaimer

made during prosecution can be rescinded, permitting recapture of the disclaimed scope, the prosecution history must be sufficiently clear to inform the examiner that the previous disclaimer, and the prior art that it was made to avoid, may need to be re-visited. *See Springs Window Fashions LP v. Novo Indus., L.P.,* 323 F.3d 989, 995 (Fed.Cir.2003) ("The public notice function of a patent and its prosecution history requires that a patentee be held to what he declares during the prosecution of his patent. A patentee may not state during prosecution that the claims do not cover a particular device and then change position and later sue a party who makes that same device for infringement.").

The district court correctly ruled that the word "opening" is not correctly construed to eliminate the sealing mechanism provided by the slitted diaphragm. On this construction, the summary judgment of noninfringement of the *'931 patent* was correct, and is affirmed.

THE '620 PATENT

The *'620 patent* also describes a valve containing a diaphragm with an opening, but the opening surrounds a conical post protruding from the surface of the blocking element; when suction is applied to the spout of the cup, the diaphragm is lifted off of the blocking element, permitting fluid to flow through the opening. Hakim describes this invention as follows:

> In the preferred embodiment, the application of negative pressure to the top of the valve causes

> an opening in a portion of the valve to move up off of the base of a protruding member extending through that opening. Once the opening is unblocked, liquid can flow freely through the valve and spout.
>
> In contrast, when not in use, the valve sits in a resting, closed position, with the opening pressed against the center seal-off, thereby sealing off the opening, slit or orifice in the valve assembly. Thus, in its relaxed state, with no negative pressure applied, the valve sits in a closed position with the fluid opening sealed by the center seal-off. In the preferred embodiment, the protruding member extends through the opening in a male to female relationship such that the orifice sits tightly on the protruding member against the protruding member's bottom portion and the center seal-off or sealing member's base.

'620 Patent, col. 1, line 51 to col. 2, line 9.

The district court granted summary judgment that the claims of the '620 patent are invalid based on anticipation by Italian Patent No. 594286 (the IT '286 patent). The IT '286 patent was not before the United States examiner, whereupon the district court analyzed the reference to determine its relevance and effect.

Appendix A

A

Hakim argues that the district court erred in invalidating the 2 620 patent without first construing the claims, citing *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343 (Fed.Cir.2001) for the proposition that an invalidity analysis begins with the construction of the claims.

Claim construction is directed to claims or claim terms whose meaning is disputed as applied to the patentee's invention in the context of the accused device. When there is no dispute as to the meaning of a term that could affect the disputed issues of the litigation, "construction" may not be necessary. We are not told what alternative meanings are sought for terms that might affect validity of the claim, or how claim "construction" would affect the issue of anticipation by the Italian patent. Hakim's methodological challenge is without substance.

B

"Anticipation" means that the claimed invention was previously known, and that all of the elements and limitations of the claim are described in a single prior art reference. *See Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1479 (Fed.Cir.1986) ("Under 35 U.S.C. § 102, anticipation requires that each and every element of the claimed invention be disclosed in a prior art reference.") The magistrate judge found that the drinking cup described in the IT 2286 reference and the drinking cup in the *'620 patent* "are substantially identical in all material respects," explaining:

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> Both inventions have a flexible valve member or diaphragm, a base and a protruding member or post, called a peduncle in the IT '286 patent. The post extends through a hole in the valve member and, when at rest in its closed position, the valve member sits tightly around the lower portion of the post in both inventions. When a child sucks on the spout, the valve member moves up the post which allows liquid to flow through the hole in the valve member. Both the '620 and the '286 patented apparatuses operate in this manner.

Hakim II, at *4.

Hakim argues that the district court erred in deciding the factual issue of anticipation adversely on summary judgment; specifically, the question of whether the IT '286 reference describes a "closed position." Hakim points out that each claim of his '620 patent requires a closed position in which the valve blocks the passage of liquid, and that the IT 2286 reference describes a valve that "produces hermetic sealing," *i.e.* that blocks the passage of air. Hakim argues that a valve can be tight enough to block the passage of air but not strong enough to block the passage of liquid, and that it cannot be assumed that when the IT '286 valve is closed it blocks the passage of liquid.

The district court rejected this argument, pointing to the IT '286 statement that its purpose is to prevent liquid from flowing when suction is not applied, that is, to block the passage of liquid in the closed position. We discern no error in the district court's analysis of the description of the device

shown in the IT '286 or the operation of the valve structure. We agree with the district court that no reasonable jury could find other than that all of the limitations of the '620 claims are present in the IT '286 device, thereby anticipating the '620 invention.

C

Mr. Hakim also argues that the district court erred in failing to analyze anticipation on a claim-by-claim basis. In particular, Hakim argues that the court ignored the limitation of claim 12 that the flexible valve "begins to invert upon the application of negative pressure." It is correct that each claim must be considered separately, and that the limitations in subordinate claims are relevant to determination of anticipation of those claims by a single reference. However, the district court did discuss the aspect of when the valve begins to invert:

> Finally, Hakim argues that unlike the IT '286 device his device requires that the flexible member "invert" or "begin to invert" and he embarks on semantical gymnastics to create a distinction in the two devices. This is not, as they say, rocket science; both of these extremely simple devices are made so that, when a child sucks on the spout, the flexible member flexes up on the post, breaking the seal, and allowing the flow of liquid. It matters not whether this movement is called inverting, "beginning to invert", flexing, sliding, moving, lifting or any other term denoting its movement. Both devices allow the liquid to

> flow when suction moves the flexible diaphragm from its "sealed" position on the post.

Hakim II at *5.

Hakim does not state that this analysis is incorrect; he just asserts that this limitation was not separately addressed in the opinion. However, the "begins to invert" limitation of claim 12 was indeed discussed. Reversible error has not been shown on this ground.

We affirm the district court's conclusion that the '620 device is anticipated by the device in the IT '286 patent, and that the claims were correctly invalidated.

Hakim's Expert Declaration

Hakim argues that the district court erred in striking his declaration offered as an expert, and that his testimony provided evidence of the validity and correct interpretation of his patents. The court sustained the exclusion as follows:

> A magistrate judge's non-dispositive order is reviewable under the clearly erroneous and contrary to law standard. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *Castillo v. Frank,* 70 F.3d 382, 385-86 (5th Cir.1995).
>
> In his Memorandum Order granting the Motion to Strike the Hakim Declaration, Magistrate Judge Kirk concluded that Hakim failed to provide a timely expert report or to

> submit himself for deposition, that expert testimony is not needed by the Court in this case, and that Hakim's testimony is self-serving, biased, and "of no assistance to the Court in understanding the 'technology' involved regarding the simple device at issue in this case."

This discretionary ruling is not grounds for reversal, for we have not been shown how the trier of fact was led into error, or could reasonably have reached a different decision had the inventor's declaration been admitted. This evidentiary ruling was in accordance with the Rules, and is affirmed.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED MAY 4, 2005

(RE: '620 PATENT)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

CIVIL ACTION 3-02-1371

NOURI E. HAKIM

VERSUS

CANNON AVENT GROUP, PLC, et al

May 3, 2005, Decided
May 4, 2005, Filed

JUDGES: ROBERT G. JAMES, UNITED STATES DISTRICT JUDGE. U.S. MAGISTRATE JUDGE JAMES D. KIRK.

OPINION BY: ROBERT G. JAMES

OPINION

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed

herein, and after a de novo review of the entire record and the written objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that defendant's motion for summary judgment, **Doc. # 89**, is GRANTED and plaintiff's claims as to the '620 patent are dismissed with prejudice.

THUS ORDERED AND SIGNED in Chambers at Monroe, Louisiana, on this 3 day of May 2005.

ROBERT G. JAMES

UNITED STATES DISTRICT JUDGE

APPENDIX C —JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED MAY 4, 2005

(RE: '931 PATENT)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

CIVIL ACTION 3-02-1371

NOURI E. HAKIM

VERSUS

CANNON AVENT GROUP, PLC, et al

May 3, 2005, Decided
May 4, 2005, Filed

JUDGES: U.S. DISTRICT JUDGE ROBERT G. JAMES. U.S. MAGISTRATE JUDGE JAMES D. KIRK.

OPINION BY: ROBERT G. JAMES

OPINION

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after a de novo review of the entire record and

the written objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that defendant's motion for summary judgment, **Doc. # 88**, is GRANTED and plaintiff's claims as to the *'931 patent* are dismissed with prejudice.

THUS ORDERED AND SIGNED in Chambers at Monroe, Louisiana, on this 3 day of May 2005.

ROBERT G. JAMES

UNITED STATES DISTRICT JUDGE

APPENDIX D -- REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED FEBRUARY 2, 2005

(RE: '620 PATENT)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
MONROE DIVISION

CIVIL ACTION 3-02-1371

NOURI E. HAKIM

VERSUS

CANNON AVENT GROUP, PLC, et al

February 2, 2005, Decided
February 2, 2005, Filed

JUDGES: JAMES D. KIRK, UNITED STATES MAGISTRATE JUDGE. U.S. DISTRICT JUDGE ROBERT G. JAMES.

OPINION BY: JAMES D. KIRK

OPINION

REPORT AND RECOMMENDATION

Before the court is a motion for summary judgment, **Doc. # 89**, filed by defendants Cannon Avent Group, PLC, et al (Avent) as to U. S. Patent No. 6,357,620 ('620 patent) belonging to plaintiff, Nouri E. Hakim (Hakim). The motion

seeks a ruling that the claims of the '620 patent are invalid as not being novel in accordance with *35 U.S.C. 102(b).*

Hakim sued defendants for patent infringement claiming to be the inventor of "technology" related to children's no-spill drinking cups. Hakim claims that on March 19, 2002 he was awarded the '620 patent. Another patent was also awarded in regard to the no-spill drinking cups, Patent No. 6,321,931, which is the subject of another motion for summary judgment, Docs. # 88 in this case. Separate Reports and Recommendations are issued this date regarding those motions and the motion for summary judgment, Doc. # 90, which also concerns the '620 patent.

Defendants denied the allegations of the complaint and filed a counterclaim against Hakim asserting the invalidity of both patents on the basis of prior use of the invention, its having been the subject of prior patents, *35 U.S.C. 102,* that it was obvious, *35 U.S.C. 103,* and that it failed to contain an adequate specification, *35 U.S.C. 112.*

Law of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure mandates that a summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, [submitted concerning the motion for summary judgment], if any, show that there is no genuine

> issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Paragraph (e) of Rule 56 also provides the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Local Rule 56.2W also provides that all material facts set forth in a statement of undisputed facts submitted by the moving party will be deemed admitted for purposes of a motion for summary judgment unless the opposing party controverts those facts by filing a short and concise statement of material facts as to which that party contends there exists a genuine issue to be tried.

A party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 at 2552, 91 L. Ed. 2d 265 (1986); *International Ass'n. of*

Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., Inc., 812 F.2d 219, 222 (5th Cir. 1987). However, movant need not negate the elements of the non-movant's case. *Little v. Liquid Air Corporation, 37 F.3d 1069, (5th Cir. 1994).* Once this burden has been met, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Izen v. Catalina,* 382 F.3d 566 (5th Cir. 2004); *Fed. R. Civ. P. 56(e).* All evidence must be considered, but the court does not make credibility determinations. If the movant fails to meet its initial burden, summary judgment should be denied. *Little,* 37 F.3d at 1075.

However, the non-movant, to avoid summary judgment as to an issue on which it would bear the burden of proof at trial, may not rest on the allegations of its pleadings but must come forward with proper summary judgment evidence sufficient to sustain a verdict in its favor on that issue. *Austin v. Will-Burt Company,* 361 F. 3d 862 (5th Cir. 2004). This burden is not satisfied with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla" of evidence. *Little,* id.

Summary judgment is as appropriate in a patent case as it is in any other case. *Desper Products, Inc. v. QSound Labs, Inc.,* 157 F.3d 1325, 1332 (Fed. Cir. 1998). Thus, Avent is entitled to summary judgment of invalidity only if the facts and inferences, when viewed in the light most favorable to Hakim, would not persuade a reasonable jury to return a verdict in favor of Hakim, the non-moving party.

Appendix D

Law of Claim Construction

A court determines patent invalidity by construing the claims and then applying that construction to the accused process or product. *W. L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1279 (Fed. Cir 1988). See also, *Business Objects, S. A. v. Microstrategy, Inc.*, 393 F.3d 1366, 2005 WL 22893 (Fed. Cir. 2005); *Markman v. Westview Instruments, Inc.*, 52 F. 3d 967, 976 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996).

Claim construction is a question of law for the court. *Markman*, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384. In determining the meaning of disputed patent claim language, the court looks first to the intrinsic evidence of record examining, in order, the claim language itself, the specification, and the prosecution history. *Alza Corporation, et al v. Mylan Laboratories Inc., et al*, 391 F.3d 1365 (Fed. Cir. 2004). "Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Extrinsic evidence (e.g. reference books, expert testimony, etc.) may only be considered to enhance the court's understanding of the technology. *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 892 (Fed. Cir. 1998). Extrinsic evidence may not be used to contradict the intrinsic evidence. *Mantech Envtl. Corp., v. Hudson Envtl. Servs., Inc.*, 152 F.3d 1368, 1373 (Fed. Cir. 1998).

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Claim terms are generally given their ordinary meaning. *Vitronics, 90 F. 3d at 1582.* Accordingly, a technical term used in a patent is interpreted as having the meaning a person "experienced in the field of the invention" would understand it to have. *Hoechst Celanese Corp. v. BP Chems. Ltd.,* 78 F.3d 1575, 1578 (Fed. Cir. 1996). A patentee may, however, act as his own lexicographer and may define a claim term differently from its ordinary meaning. Id.

A fundamental precept in claim construction jurisprudence requires construing the meaning of a claim to avoid recapture of interpretations disclaimed during prosecution of the claim before the patent office. *Omega Engineering, Inc. v. Raytek Corp.,* 334 F. 3d 1314, 1323 (Fed. Cir. 2003), *Southwall Technologies., Inc. v. Cardinal IG Co.,* 54 F. 3d 1570, 1576 (Fed Cir. 1995). The disclaimer, however must be effected with "reasonable clarity and deliberateness", *Springs Window Fashions LP v. Novo Industries, LP,* 323 F. 3d 989. 994 (Fed Cir. 2003), that is, it must be both "clear and unmistakable", *Omega Engineering, Inc.,* 334 F.3d at 1325-6. Construing a patent consistent with arguments made during its prosecution supports the public notice function of the patent record; a patentee is, therefore, held to the particular claim construction argued during patent prosecution to preserve public reliance on statements made in the public record. *Springs Window Fashions LP,* 323 F.3d at 995.

Law of Invalidity

A determination that a patent is invalid as being anticipated under *35 U.S.C. 102* requires a finding that "each

and every limitation is found either expressly or inherently in a single prior art reference." *Celeritas Techs., Ltd. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1361 (Fed. Cir. 1998). Anticipation under 102 requires "the presence in a single prior art disclosure of all elements of a claimed invention arranged as in that claim." *Carella v. Starlight Archery & Pro Line Co.*, 804 F.2d 135, 138 (Fed. Cir. 1998). Clear and convincing evidence is required to show invalidity. *WMS Gaming, Inc. v. Int'l Game Technology*, 184 F.3d 1339, 1355-56 (Fed. Cir. 1999).

Analysis

Plaintiff originally claimed violation of claim numbers 1-6, 11-15, and 20-25. However, plaintiff advised the court that he did not wish to pursue a violation of claim 25. Doc. # 95. Only claims 1,6,11,13 and 23 are "independent claims"; the rest are dependent claims, that is, they contain "a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed." *35 U.S.C. 112.*

The no-spill drinking cup apparatus described in the '620 patent and Avent's allegedly infringing product both seek to provide a method by which a small child can obtain a liquid drink by sucking on the spout of the bottle top, but when no suction is applied, the spout is blocked so that no liquid, or at least little liquid, can escape. Both products accomplish this by use of a simple valve which includes a diaphragm made of a flexible material such as silicone.

Avent asserts that Hakim's valve is invalid under *35 U.S.C. 102(b)* as being anticipated and not novel. In

support of its argument, Avent relies primarily on the intrinsic evidence regarding the patent.

The prosecution history shows that after the patent was applied for, it was denied on February 17, 2000 by the patent office, pursuant to *35 U.S.C. 102(b),* which provides, in pertinent part:

> A person shall be entitled to a patent unless
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Specifically, the patent office stated that the claims were rejected "as being clearly anticipated by the prior Belcastro patent." See Defendant's Exhibit 6.

In response to the rejection, Hakim filed a "Response", Defendants's Exhibit 6, in which he sought to distinguish the Delcastro invention. The patent office then, on November 7, 2000 rejected claims 1, 2, 5, 6, 9, and 11-17 as being clearly anticipated by Belcastro. Hakim Exh. 44, p.317,318. In May of 2001, Hakim filed an "Amendment and Response", Def. Exh 7, in which he again attempted to distinguish the prior art of Belcastro, deleted claims 1, 2, and 5 and added claims 28 and 29. The patent office then, for the second time, rejected claims 6,9,11-17, and also 28 and 29. Hakim Exh. 44, p. 330. Plaintiff then met with the patent examiner and again filed an "Amendment and Response" in which he confirmed

that agreement had been reached as to claims 6, 7, 8, 10, 16, 19, 20, and 28. Def. Exh. 8. A patent was issued. Hakim Exh. 1.

The prior patent to which defendants refer, being IT '286 was never discussed or considered during the application and prosecution process regarding patent '620.

The '620 patent claims describe an apparatus for preventing spilling during drinking. The apparatus includes a valve comprising a protruding member or post and a flexible valve member with an opening through which the protruding member extends. In the closed position (when no sucking occurs) the protruding member extending through the valve member blocks the flow of liquid. When suction is applied, the valve member "is pulled away from said protruding member for the passage of liquid through said opening". In a preferred embodiment, the post would be tapered, or conical shaped, so that the harder a child sucks, the further up the post the member moves and more liquid is allowed to flow.

The IT '286 operates in the same manner.

As mentioned earlier, the IT '286 patent was not considered by the patent office in the proceedings regarding the Hakim '620 patent.

As can be seen from the drawings, above, and the patent claims, the claims in the '620 valve apparatus and the IT '286 assembly are substantially identical in all material respects. Both inventions have a flexible valve member or diaphragm, a base and a protruding member or post, called a

peduncle in the IT '286 patent. The post extends through a hole in the valve member and, when at rest in its closed position, the valve member sits tightly around the lower portion of the post in both inventions. See Hakim Exh. 44, p. 325 and claims 23 and 25, Def. Exh 1. When a child sucks on the spout, the valve member moves up the post which allows liquid to flow through the hole in the valve member. Both the '620 and the '286 patented apparatuses operate in this manner. See Def. Exh. 2, 3.

Plaintiff attempts in brief to distinguish the patents by first suggesting that the IT patent does not disclose a no-spill drinking cup. However, as defendant correctly points out in brief, the '620 patent is for an apparatus, not a drinking cup. The IT patent is for a "valve cap applicable to the throat of a feeding bottle". "Apparatus claims cover what a device is, not what it does." *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990). Generally, the preamble does not limit the claims. *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1346 (Fed. Cir. 2002). Further there is no meaningful difference in the "drinking cup" referred to in the preamble of the Hakim patent '620 and the "feeding bottle" referred to in the IT patent '286. The difference is one of semantics and what it is called depends more on the age of the child using the device than how it functions. Both valves operate identically.

Next Hakim suggests that the IT '286 device does not have a closed position. This assertion is baffling, for as the claims of the IT '286 suggest, and as the drawings reflect, the flexible member fits tightly around the lower portion of the post in both devices to seal off the flow of liquid. See

especially, drawing contained in IT patent at Def. Exh. 2, p. A003899 and claim 3. Plaintiff's suggestion that the IT device contains only an airtight seal and not a liquid tight seal is equally unconvincing as being directly contradicted by the IT '286 claims [see IT '286 Claim 1 ("suitable for regulating and limiting the outflow from the feeding bottle")] and the very purpose of the device. The IT valve is intended to seal the bottle when not in use. The mechanisms are the same, regardless of their intended purpose.

Next Hakim suggests that the IT '286 patent does not suggest the device can be attached to a cap as per claim 5 of his patent. To the contrary, the IT patent refers repeatedly to a "valve/cap" and the "body of the valve/cap". See also drawings at Def. Exh. 2, p. A 003899.

Finally, Hakim argues that unlike the IT '286 device his device requires that the flexible member "invert" or "begin to invert" and he embarks on semantical gymnastics to create a distinction in the two devices. This is not, as they say, rocket science; both of these extremely simple devices are made so that, when a child sucks on the spout, the flexible member flexes up on the post, breaking the seal, and allowing the flow of liquid. It matters not whether this movement is called inverting, "beginning to invert", flexing, sliding, moving, lifting or any other term denoting its movement. Both devices allow the liquid to flow when suction moves the flexible diaphragm from its "sealed" position on the post.

Appendix D

The Extrinsic Evidence

Certain extrinsic evidence has been filed by both parties in connection with this motion. That evidence consists of the affidavit of Mr. Hakim and copies of depositions, including expert deposition testimony. However, I find that consideration of the extrinsic evidence is not necessary in this case. The "technology" involved in the devices at issue is extremely simple and expert testimony is not needed to assist the court in understanding the products or the claims. *EMI Group N. Am.*, 157 F.3d at 892. Further, this court is not required to consider expert testimony when considering the defense of anticipation. The case of *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304 (Fed. Cir. 2002), cited by plaintiffs does not so hold. Schumer only held that if expert testimony is heard, it must be from one skilled in the art.

Summary

Therefore, I find by clear and convincing evidence that there exists no genuine issues of material fact and that Avent is entitled to judgment as a matter of law that the '620 patent is invalid.

For the foregoing reasons, IT IS RECOMMENDED that Defendant, Avent's, Motion for Summary Judgment, Doc. # 89, be GRANTED and that plaintiff's claims as to the '620 patent be dismissed with prejudice.

Appendix D

OBJECTIONS

Under the provisions of *28 U.S.C. § 636(b)(1)(C)* and *Fed.R.Civ.P. 72(b),* the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 2nd day of February, 2005.

JAMES D. KIRK

UNITED STATES MAGISTRATE JUDGE

APPENDIX E — REPORT AND RECOMMENDATION OFTHE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED FEBRUARY 2, 2005

(RE: '931 PATENT)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

CIVIL ACTION 3-02-1371

NOURI E. HAKIM

VERSUS

CANNON AVENT GROUP, PLC, et al

February 2, 2005, Decided
February 2, 2005, Filed

JUDGES: U.S. MAGISTRATE JUDGE JAMES D. KIRK. U.S. DISTRICT JUDGE ROBERT G. JAMES.

OPINION BY: JAMES D. KIRK

OPINION

REPORT AND RECOMMENDATION

Before the court is a motion for summary judgment, **Doc. # 88**, filed by defendants Cannon Avent Group, PLC, et al (Avent) as to U. S. Patent No. 6,321,931 ('931 patent) belonging to plaintiff, Nouri E. Hakim (Hakim). The motion seeks a ruling that the claims of the '931 patent are not

infringed, or, in the alternative, are invalid as having been the subject of previous patents.

Hakim sued defendants for patent infringement claiming to be the inventor of "technology" related to children's no-spill drinking cups. Hakim claims that on November 27, 2001 he was awarded the '931 patent. Another patent was also awarded in regard to the no-spill drinking cups, Patent No. 6,357,620, which is the subject of motions for summary judgment, Docs. # 89 and 90 in this case. Separate Reports and Recommendations are issued this date regarding those motions.

Defendants denied the allegations of the complaint and filed a counterclaim against Hakim asserting the invalidity of both patents on the basis of prior use of the invention, its having been the subject of prior patents, *35 U.S.C. 102,* that it was obvious, *35 U.S.C. 103,* and that it failed to contain an adequate specification, *35 U.S.C. 112.*

The law of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure mandates that a summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, [submitted concerning the motion for summary judgment], if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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Paragraph (e) of Rule 56 also provides the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Local Rule 56.2W also provides that all material facts set forth in a statement of undisputed facts submitted by the moving party will be deemed admitted for purposes of a motion for summary judgment unless the opposing party controverts those facts by filing a short and concise statement of material facts as to which that party contends there exists a genuine issue to be tried.

A party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 at 2552, 91 L. Ed. 2d 265 (1986); *International Ass'n. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., Inc.,* 812 F.2d 219, 222 (5th Cir. 1987). However, movant need not negate the elements of

the non-movant's case. *Little v. Liquid Air Corporation,* 37 F.3d 1069, (5th Cir. 1994). Once this burden has been met, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Izen v. Catalina,* 382 F.3d 566 (5th Cir. 2004); *Fed. R. Civ. P. 56(e).* All evidence must be considered, but the court does not make credibility determinations. If the movant fails to meet its initial burden, summary judgment should be denied. *Little,* 37 F.3d at 1075.

However, the non-movant, to avoid summary judgment as to an issue on which it would bear the burden of proof at trial, may not rest on the allegations of its pleadings but must come forward with proper summary judgment evidence sufficient to sustain a verdict in its favor on that issue. *Austin v. Will-Burt Company,* 361 F. 3d 862 (5th Cir. 2004). This burden is not satisfied with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla" of evidence. Little, id.

Summary judgment is as appropriate in a patent case as it is in any other case. *Desper Products, Inc. v. QSound Labs, Inc.,* 157 F.3d 1325, 1332 (Fed. Cir 1998). Thus, Avent is entitled to summary judgment of no infringement only if the facts and inferences, when viewed in the light most favorable to Hakim would not persuade a reasonable jury to return a verdict in favor of Hakim, the non-moving party.

Appendix E

Procedure for Analyzing a Patent Claim

A court determines patent infringement by construing the claims and then applying that construction to the accused process or product. *Business Objects, S. A. v. Microstrategy, Inc.*, 393 F.3d 1366, 2005 WL 22893 (Fed. Cir. 2005), *Markman v. Westview Instruments, Inc.*, 52 F. 3d 967, 976 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996). Claim construction is a question of law for the court. *Markman*, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384. In determining the meaning of disputed patent claim language, the court looks first to the intrinsic evidence of record examining, in order, the claim language itself, the specification, and the prosecution history. *Alza Corporation, et al v. Mylan Laboratories inc., et al*, 391 F.3d 1365 (Fed. Cir. 2004). "Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Extrinsic evidence (e.g. reference books, expert testimony, etc.) may only be considered to enhance the court's understanding of the technology. *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 892 (Fed. Cir. 1998). Extrinsic evidence may not be used to contradict the intrinsic evidence. *Mantech Envtl. Corp., v. Hudson Envtl. Servs., Inc.*, 152 F.3d 1368, 1373 (Fed. Cir. 1998).

Claim terms are generally given their ordinary meaning. *Vitronics*, 90 F.3d at 1582. Accordingly, a technical term used in a patent is interpreted as having the meaning a person "experienced in the field of the invention" would understand it to have. *Hoechst Celanese Corp. v. BP Chems. Ltd.*,

78 F.3d 1575, 1578 (Fed. Cir. 1996). A patentee may, however, act as his own lexicographer and may define a claim term differently from its ordinary meaning. Id.

A fundamental precept in claim construction jurisprudence requires construing the meaning of a claim to avoid recapture of interpretations disclaimed during prosecution of the claim before the patent office. *Omega Engineering, Inc. v. Raytek Corp.*, 334 F. 3d 1314, 1323 (Fed. Cir. 2003), *Southwall Technologies., Inc. v. Cardinal IG Co.*, 54 F. 3d 1570, 1576 (Fed Cir. 1995). The disclaimer, however must be effected with "reasonable clarity and deliberateness", *Springs Window Fashions LP v. Novo Industries., LP,* 323 F. 3d 989, 994 (Fed Cir. 2003), that is, it must be both "clear and unmistakable", *Omega Engineering, Inc.,* 334 F.3d at 1325-6. Construing a patent consistent with arguments made during its prosecution supports the public notice function of the patent record; a patentee is, therefore, held to the particular claim construction argued during patent prosecution to preserve public reliance on statements made in the public record. *Springs Window Fashions LP,* 323 F.3d at 995.

Analysis

Plaintiff originally claimed violation of claim numbers 3,4,8,9-14,18,20,21,23, and 26. However, plaintiff advised the court that he wished to pursue a violation only of claims 3,4,9,10,13, and 14. Doc. # 95. Only claims 3 and 8 are "independent claims"; the rest are dependent claims, that is, they contain "a reference to a claim previously set forth and

then specify a further limitation of the subject matter claimed." *35 U.S.C. 112.*

The no-spill drinking cup apparatus described in the '931 patent and Avent's allegedly infringing product both seek to provide a method by which a small child can obtain a liquid drink by sucking on the spout of the bottle top, but when no suction is applied, the spout is blocked so that no liquid, or at least little liquid, can escape. Both products accomplish this by use of a simple valve which includes a diaphragm made of a flexible material such as silicone.

Avent asserts that its valve does not infringe because Hakim's patent covers a valve having two separate liquid blocking mechanisms. In support of its argument, Avent relies on the prosecution history of the patent. The court agrees that the issue of infringement in this case cannot be resolved solely by review of the claims and the specifications and that the prosecution history must also be considered. Those claims and specifications suggest only a flexible valve diaphragm which, in its resting position, seats against a "blocking element" so that liquid cannot escape but, when suction is applied, lifts away from the blocking element creating a space through which liquid can flow.

The prosecution history shows that after the patent was applied for by Hakim, it was denied on January 27, 2000 by the patent office, pursuant to *35 U.S.C. 102,* which provides, in pertinent part:

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A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Specifically, the patent office stated that the claims were rejected "as being clearly anticipated by Robbins III, et al, Bachman, et al or Belcastro. See Defendant's Exhibit 4. The three names refer to prior patents.

In response to the rejection, Hakim filed an "Amendment and Response", Defendants's Exhibit 5, in which he changed certain language in some of the claims and referred in some of the changes to the opening in the flexible valve material as being a "slit". In the "remarks" section of the Amendment and Response Hakim sought to distinguish the Robbins III, Bachman, and Belcastro inventions.

Importantly, Hakim went to great lengths to distinguish his invention emphasizing that his invention utilizes "two separate mechanisms" to close off the passage of liquid through the valve, not just one as the prior patented inventions had used. He stated:

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"This suction causes the flexible material to lift off of the blocking element, moving the slit off of that blocking element. **In addition,** since the valve material is flexible, **the flexing of the material will also stretch the slit,** facilitating the passage of liquid through the valve." (Emphasis added).

"Thus **two separate mechanisms** are both used to close off the passage of liquid through the valve when not in use. The **first** mechanism involves an inverting, flexible valve material which has a **slit** therein and responds to suction. The **second** mechanism involves the use of a **blocking element,** which is impenetrable to the passage of liquid. The slit sits against the blocking element, sealing or blocking off the slit, to yet **further** prevent the passage of liquid through the valve." (Emphasis added).

Hakim further argued "by providing **both** the elastomeric member with a slit **and** a blocking element, a sealing mechanism is provided which reduces spillage **beyond that of either mechanism alone.** None of the references cited in the Office Action (Robbins III, Bachman, and Belcastro) teach or suggest such a no-spill mechanism having a slit sitting against a blocking element **such as is recited in all of the pending claims."** (Emphasis added).

He further stated "Robbins, however does not teach or suggest the use of a separate, **additional** closing element for the slit to rest against." (Emphasis added).

The prosecution history makes perfectly clear that Hakim specifically distinguished his invention from the prior art by

limiting it to an apparatus with both (1) a slit which closes when suction is not applied, and (2) a second closure consisting of a blocking element which the slit rests against.

After plaintiff's explanation, a Notice of Allowance was issued by the patent office on December 22, 2000. However, on March 21, 2001 Hakim amended the application for the patent by changing "slit" to "opening" in claims 1 and 2, which Hakim said broadened the claims. See Defendant's Exhibit 7. No new patentability arguments were presented. The '931 patent was issued. However, Hakim's amendment to add "opening" instead of "slit" did not change the requirement of his patent that the device have **two** mechanisms to stop the flow of liquid. Because Hakim did not retract any of his arguments distinguishing the prior art, he is held to the restrictive claim construction he argued during prosecution of the patent. *Springs Window,* 323 F.3d at 995.

The Avent valve utilizes only one and not two mechanisms for blocking the liquid. It, like the Hakim valve, contains a flexible diaphragm with a hole in it which diaphragm, when at rest, seats itself against a "blocking element" thus sealing off the liquid. However, the Avent valve does not have *two* mechanisms for sealing off the liquid, but only one.

In asserting that the Avent valve infringes plaintiff's patent, Hakim suggests that it is necessary for the court to interpret the term "opening" in the claims. Hakim further suggests that Avent is claiming that Hakim's patent requires

a "slit". Avent denies that it is claiming the Hakim patent requires a slit.

It is not necessary for the court to interpret "opening" or determine whether the Hakim patent requires there to be a "slit" because it is clear that what the Hakim invention and patent does require is two separate mechanisms to close off the liquid: First, a flexible diaphragm with an opening which stretches open when suction is applied but is closed when not stretched, and second, a blocking element against which the opening in the diaphragm rests.[1]

Hakim also urges the court to interpret the term "closed position". However, interpretation of that term is not necessary to the construction of the claims because, regardless of the meaning, the "Amendment and Response" makes perfectly clear that two mechanisms are required, as described above. The term "closed position" is used by Hakim both in the patent claims and in his "Amendment and Response". The term was used in its ordinary meaning but in two different contexts, and not as a term of art. *Vitronics,* 90 F.3d at 1582. According to the clear and unmistakable language used by Hakim in the "Amendment and Response"

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1 . While there is much discussion in brief by the parties about whether any "opening" other than a "slit" would accomplish the result envisioned by the patent, the court need not decide that question, for whatever kind of opening is created, it must be self-sealing based on Hakim's statements made in prosecuting the patent. For example, a T-shaped opening, an X shaped opening, or a plus sign shaped opening would work (that is they would open when stretched and close when at rest): whether those are considered "slits" or just "openings" is beside the point.

the patent requires "flexible" or "elastomeric" valve material which, when flexed, will "stretch the slit [or opening or orifice or hole]". In its resting position, "**the slit is not being stretched and is in a closed position**." Clearly, the term "closed position" here means that the slit is not stretched into an open position. Otherwise, this would not constitute a second mechanism for stopping the flow of liquid. Equally clear is the meaning as used in the claims, where it is stated in claim 3, for example, that the valve has a closed position and an open position where the "valve member sits against a blocking element with said opening against said blocking element when in said closed position **such that said blocking element blocks** the passage of fluid. . . ." (Emphasis added). It is obvious that, when at rest, both mechanisms are in their closed position, that is, the slit is not stretched open and the slit is "sealed" against the blocking element.

Hakim's arguments, through counsel, are at best disingenuous, for he clearly stated in prosecution of the patent: "In addition, since the valve material is flexible, the flexing of the material will **also** stretch the slit, facilitating the passage of liquid through the valve." Further, counsel's suggestion that the prosecution language merely "mentions" two mechanisms and that the two mechanisms are (1) the flexible valve material and (2) the blocking element is equally specious. For Hakim made clear in the prosecution language at p. 7, in order to obtain the patent, that the two mechanisms are (1) the slit in the flexible valve material which, when suction is applied, opens to allow the flow of liquid, and the seating of the slit against the blocking element.

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Hakim's statements were clear and were deliberate, having been made specifically to convince the patent office to grant the patent after it had initially been denied. The impossibility of counsel's argument is further shown by Hakim's statement that "by providing **both** the elastomeric member with a slit **and** a blocking element, a sealing mechanism is provided which reduces spillage **beyond that of either mechanism alone.**" If the "blocking element" is, as counsel suggests, one of the two mechanisms, how could it "alone" possibly stop the flow of liquid?

Now that the scope of the claims has been determined, it is necessary to determine whether the Avent valve infringes those claims. I find by clear and convincing evidence that the Avent product does not infringe Hakim patent '931. The simple fact is that, unlike Hakim's patent, the Avent product does not contain two mechanisms of any kind to stop the flow of liquid. Rather, the Avent product uses a basic design which, although modified, has been well known since at least as early as 1959. See discussion below. Further, the diaphragm in Avent's valve does not independently block fluid flow. The only blocking mechanism in the Avent valve is the action of the diaphragm sitting against the blocking element and "sealing" off the flow of liquid.

Otherwise the Hakim Patent is Invalid

Were the court not to construe the patent in this manner, then the invalidity of the Hakim patent '931 is assured. For Hakim's patent would be no more than a duplication of the prior art, which is why it was rejected by the patent office in the first place. The concept of a flexible diaphragm with a

hole [2] in it which rests against a blocking element to shut off the flow of liquid when pressure (sucking) is not applied, has been known since at least 1959 and is the subject of at least four patents. *35 U.S.C. 102(b).* The first is the EP '828 European patent, the second is the IT '286 Italian patent, the third is the Robbins III U. S. patent, copies of which appear at Defendants' Exhibits 2, 3, and 15, respectively, and the fourth is the Belcastro patent cited by the patent office in its initial denial of the patent which appears at Def's Exh. 5 filed in connection with the Motion for Summary Judgment regarding the '620 patent, Doc. # 89. Whether the patent also offends the Bachman patent cited by the patent office, is unknown; a copy of that patent does not appear of record. Had Hakim not differentiated his invention by insisting that it involved two mechanisms, not just one, he would have had no patent at all. However, because the '931 patent requires two mechanisms, it is not necessary to find the Hakim '931 patent invalid as being no invention and anticipated by the prior art.

The Extrinsic Evidence

Certain extrinsic evidence has been filed by both parties in connection with this motion. That evidence consists of the affidavit of Mr. Hakim and copies of depositions, including expert deposition testimony. However, I find that consideration of the extrinsic evidence is not necessary in this case. The "technology" involved in the devices at issue is extremely simple and expert testimony is not needed to assist the court in understanding the products or the claims. *EMI Group N. Am.*, 157 F.3d at 892.

2. Call it what you want.

Appendix E

Summary

Therefore, I find that there exists no genuine issue of material fact and that Avent is entitled to judgment as a matter of law that the Avent patent does not infringe any of the claims 3, 4, 8, 9, 10, 11, 12, 13, 14, 18, 20, 21, 23, or 26 [3] of the Hakim '931 patent.

For the foregoing reasons, IT IS RECOMMENDED that Defendant, Avent's, Motion for Summary Judgment, Doc. # 88, be GRANTED and that plaintiff's claims as to the '931 patent be dismissed with prejudice.

OBJECTIONS

Under the provisions of *28 U.S.C. § 636(b)(1)(C)* and *Fed.R.Civ.P. 72(b),* the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

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3. None of these claims have been dismissed by the court and are now before the court for consideration on this motion. Judicial efficiency requires that all of the claims in the patent be considered now.

Appendix E

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOM MENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on tnis the 2nd day of February, 2005.

JAMES D. KIRK

UNITED STATES MAGISTRATE JUDGE

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 2, 2007

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-1398

NOURI E. HAKIM

Plaintiff-Appellant

v.

CANNON AVENT GROUP, PLC, CANNON RUBBER LIMITED and AVENT AMERICA, INC.,

Defendants-Appellees.

May 2, 2007, Decided
May 2, 2007, Filed

OPINION

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellees, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter

the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 9, 2007.

APPENDIX G — U.S. PATENT NO. 6357620 (EXCERPTED)

United States Patent **6,357,620**

Hakim **March 19, 2002**

No-spill drinking cup apparatus

Abstract

An improved no-spill cup construction and valve assembly which provides an extremely secure seal against accidental liquid flow from the cup spout. The act of sucking at the cup spout creates negative pressure or a partial vacuum against a valve member near the spout having an opening therein, causing the valve member and opening to move off of a protruding member, thereby unblocking the opening in the valve. When the opening is unblocked, liquid can flow freely through the valve and spout. When not in use, the valve sits in a resting, closed position, with the opening in the valve sitting on a protruding member and pressed against the protruding member's base, sealing off the opening in the valve assembly. The closed position provides an extremely secure seal against fluid leakage, such that inadvertent spills or even deliberate attempts to force liquid outside of the cup, such as by turning the cup upside down, or shaking the cup, are ineffective. The cup assembly further allows variable liquid flow depending on the levels of suction applied, and allows flow to be regulated between regular or maximum flow and minimal flow levels or rates by rotating the position of the valve assembly in the cover of the cup.

Appendix G

Claims

I claim:

1. An apparatus for preventing spilling during drinking, said apparatus comprising:

a valve, said valve comprising a protruding member and a valve member, said valve member comprising an opening, said valve having a closed position and in an open position,

said closed position being a configuration in which said protruding member extends through said opening of said valve member to block the passage of liquid through said opening,

said valve further being movable into an open position in which said valve member is pulled away from said protruding member for the passage of liquid through said opening,

said valve moving from said closed position to said open position upon the application of negative pressure to said valve member.

2. An apparatus as claimed in claim 1, wherein said apparatus comprises a cap for a cup.

3. An apparatus as claimed in claim 1, wherein said apparatus comprises a drinking cup.

4. An apparatus as claimed in claim 1, wherein said apparatus comprises a valve assembly.

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5. An apparatus as claimed in claim 1, wherein said apparatus comprises a valve assembly and a cap, said valve being a part of said valve assembly, said valve assembly and cap being configured such that said valve assembly can be attached to said cap.

6. An apparatus as claimed in claim 1, further comprising a sealing member, said sealing member comprising said protruding member and a base, said protruding member being attached to said base.

7. An apparatus as claimed in claim 6, herein said base is approximately flat.

8. An apparatus as claimed in claim 6, wherein said protruding member is a post.

9. An apparatus as claimed in claim 6, wherein said protruding member is conical.

10. An apparatus as claimed in claim 6, wherein at least a portion of said post is tapered.

11. A no spill drinking apparatus, comprising:

a valve, said valve comprising a sealing member and a flexible valve member, said sealing member comprising a protruding member and a base, said valve member comprising an opening therein;

said valve having a closed position, said closed position being a configuration in which said valve member rests proximal

to said base with said protruding member extending through said opening, to block the passage of liquid through said opening;

wherein said valve moves into an open position upon application of negative pressure to said valve, said open position being a position in which said valve member is distal to said base, with said opening at least partially unblocked, to allow the passage of liquid through said valve.

12. An apparatus as claimed in claim 11, wherein said valve rests in said closed position, and begins to invert upon the application of negative pressure to said valve member, to move from said closed position to said open position.

13. A no spill drinking apparatus, comprising:

a valve, said valve comprising a sealing member and a valve member, said sealing member comprising a protruding member and a base, said valve member comprising a substantially circular opening therein, said protruding member having an upper portion and a lower portion;

said upper portion being of smaller diameter than said lower portion;

said valve having a closed position and in an open position, said closed position being a configuration in which said valve member rests proximal to said base with said protruding member extending through said opening to block the passage of liquid through said opening;

said valve moving into an open position upon the application of negative pressure to said opening by the mouth of a user for the purpose of drinking out of said apparatus, said open position being a position in which said valve member moves distal to said base to separate away from said opening, such that said opening is at least partially unblocked to allow the passage of liquid through said opening and said valve.

14. An apparatus as claimed in claim 13, wherein said apparatus comprises a cap for a cup.

15. An apparatus as claimed in claim 13, wherein said apparatus comprises a drinking cup.

16. An apparatus as claimed in claim 13, wherein said apparatus comprises a valve assembly.

17. An apparatus as claimed in claim 13, wherein said protruding member is tapered.

18. An apparatus as claimed in claim 13, wherein at least a portion of said protruding member is tapered at an angle of seven (7) degrees.

19. An apparatus as claimed in claim 13, wherein at least a portion of said protruding member is tapered at an angle of nine (9) degrees.

20. An apparatus as claimed in claim 13, wherein said protruding member extends through and beyond said opening in said closed position.

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21. An apparatus as claimed in claim 13, wherein said apparatus further comprises an anti-inversion member, said anti-inversion member being placed at a sufficiently close distance to such valve member such that such valve member will hit said anti-inversion member and be blocked from further inversion before said valve member fully inverts.

22. An apparatus as claimed in claim 13, wherein said valve member comprises a flexible material.

23. A no spill drinking apparatus, comprising:

a valve, said valve comprising a sealing member and a flexible valve member, said sealing member comprising a protruding member and a base, said valve member comprising an opening therein;

said valve having a closed position and an open position, wherein at least a portion of said sealing member extends through said opening while said valve is in said closed position, said valve member resting closer to said base in said closed position than in said open position; and,

wherein said protruding member of said valve is fixed, and said valve member moves upon application of negative pressure to said valve member.

24. An apparatus as claimed in claim 23, wherein said valve member moves away from said base upon the application of negative pressure to said valve.

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25. A no spill drinking apparatus, comprising:

a valve, said valve comprising a post and a base, said valve further comprising a flexible valve member having a hole;

said valve having a closed position and an open position, wherein said post extends through said hole while said valve is in said closed position, and wherein said flexible valve member rests closer to said base in said closed position than in said open position; and,

wherein said post of said valve is fixed and said flexible valve member moves away from said base upon application of negative pressure to said valve member.

APPENDIX H — U.S. PATENT NO. 6321931 (EXCERPTED)

United States Patent **6,321,931**

***Hakim*, et al.** **November 27, 2001**

No-spill drinking cup apparatus

Abstract

An improved no-spill cup construction and valve assembly which provides an extremely secure seal against accidental liquid flow from the cup spout. The act of sucking at the cup spout creates negative pressure or a partial vacuum against a valve near the spout, causing the valve to invert which unblocks an opening in the valve. When the opening is unblocked, liquid can flow freely through the valve and spout. When not in use, the valve sits in a resting, closed position, with the valve pressed against a center seal-off, sealing off the opening in the valve assembly. The closed position provides an extremely secure seal against fluid leakage, such that inadvertent spills or even deliberate attempts to force liquid outside of the cup, such as by turning the cup upside down, or shaking the cup, are ineffective. The cup assembly further allows liquid flow to be regulated between regular or maximum flow and minimal flow levels or rates by rotating the position of the valve assembly in the cover of the cup.

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Description

FIELD OF THE INVENTION

The present invention relates to a no-spill cup assembly with an improved valve mechanism to prevent liquid from flowing out of the cup when not desired.

. . .

DETAILED DESCRIPTION OF THE INVENTION AND THE PREFERRED EMBODIMENTS

. . .

Any form of desired opening suitable for passage of a desired level of liquid can be utilized in the valve. The opening 70 can be, for example, a slit, a slot, an orifice, a hole, or so forth. Likewise, by the term opening, it is contemplated that multiple openings of these or any other types can be provided as well.

. . .

Claims

. . .

1. An apparatus for use in a no-spill drinking cup, said apparatus comprising:

a valve holder, such valve holder comprising at least one valve and a blocking element, said valve comprising a flexible material, said blocking element comprising an area

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of material which is impenetrable to the flow of liquid, said valve further comprising an opening through said flexible material, said valve having a resting position wherein said flexible material sits with said opening against said blocking element such that said valve is closed to the passage of liquid through said valve, said valve moving into an open position for the passage of liquid through said valve upon the application of negative air pressure to the top of said valve, said open position being a position wherein said flexible member comprising said opening lifts off of said blocking element.

2. An apparatus as claimed in claim 1, further comprising a cover, said valve holder being located in said cover, and a cup, said cover being adapted to attach to said cup.

3. An apparatus for use in a no-spill drinking cup, comprising:

a flexible valve member comprising an opening through said valve member, said valve member having a closed position and an open position, wherein said valve member sits against a blocking element with said opening against said blocking element when in said closed position such that said blocking element blocks the passage of fluid through said opening in said valve member, and wherein said valve member moves away from said blocking element to allow passage of liquid though said opening of said valve member upon application of negative air pressure to said valve member.

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4. An apparatus as claimed in claim 3, further comprising a cover, said flexible valve member being located in said cover, and a cup, said cover being adapted to attach to said cup.

5. A no-spill cup apparatus, comprising:

a flexible valve member comprising an opening in said valve member, said flexible member having a proximal side and a distal side; and

a blocking element, said blocking element comprising a first area which is impenetrable to the flow of liquid, and a second area through which liquid can flow, said distal side of said flexible valve member resting against said blocking element when said flexible valve member is in the resting, closed position such that said opening of said flexible valve member rests against said first area when said flexible valve member is in said resting, closed position, said flexible valve member backing off said blocking element upon the application of negative air pressure to said proximal side of said flexible valve member to allow fluid to flow through said second area of said blocking element and through said opening of said flexible valve member.

6. An apparatus as claimed in claim 5, wherein said opening comprises a slit.

7. An apparatus as claimed in claim 5, wherein said first area is the central area of said blocking element, and wherein said second area is the peripheral area of said blocking element.

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8. A no-spill drinking cup apparatus, comprising:

a flexible valve member, said flexible valve member having an opening therein; and,

a blocking element said flexible valve member resting against said blocking element when said valve member is in its closed position such that said opening sits against said blocking element to block the passage of liquid through said opening.

9. An apparatus as claimed in claim 8, said flexible valve member further comprising an open position, said flexible valve member being displaced away from said blocking element in said open position to provide liquid access to said opening, said flexible member assuming said open position upon application of negative air pressure to the top of said valve member.

10. An apparatus as claimed in claim 9, wherein said flexible valve member inverts upon application of negative air pressure to said valve member to move said opening away from said blocking element.

11. An apparatus as claimed in claim 8, wherein said flexible valve member is located in a valve assembly.

12. An apparatus as claimed in claim 11, wherein said valve assembly comprises at least one subunit for containing said valve member.

13. An apparatus as claimed in claim 12, wherein said valve assembly comprises at least two subunits, each of said subunits comprising a valve member therein.

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14. An apparatus as claimed in claim 12, wherein said valve assembly comprises at least two subunits, a first subunit comprising a first valve member comprising a first opening, and a second subunit comprising a second valve member comprising a second opening, said first opening being larger than said second opening.

15. An assembly as claimed in claim 14, wherein said first opening is an "X" shaped slot.

16. An assembly as claimed in claim 14, wherein said second opening is a "T" shaped slot.

17. An assembly as claimed in claim 14, wherein said first opening is an "X" shaped slot and said second opening is a "T" shaped slot.

18. An assembly as claimed in claim 8, wherein said assembly further comprises a removable cap.

19. An assembly as claimed in claim 8, wherein said cap comprises a valve assembly carrier for securing said valve assembly to said cap.

20. An assembly as claimed in claim 18, further comprising a cup for attachment to said removable cap.

21. An assembly as claimed in claim 20, wherein said cap is provided with screw threads for screwing onto said cup.

22. An assembly as claimed in claim 20, wherein said cap is a snap-on cap, for attachment to said cup.

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23. An apparatus as claimed in claim 12, wherein said blocking element is located in said subunit.

24. An apparatus as claimed in claim 23, wherein said blocking element comprises a solid central area impenetrable to liquid flow, and a peripheral region surrounding said central area, said peripheral region having at least one area open to the passage of liquid.

25. An apparatus as claimed in claim 24, wherein said opening rests against said central region when said valve member is in its closed position.

26. An apparatus as claimed in claim 23, wherein said subunit comprises a valve retainer for securing said flexible valve member in said subunit.

27. An apparatus as claimed in claim 8, wherein said opening comprises a slit.

28. An apparatus as claimed in claim 1, wherein said opening is a slit.

29. An apparatus as claimed in claim 3, wherein said opening is a slit.

APPENDIX I — RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED MAY 4, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

No. 02-1371

NOURI E. HAKIM,

v.

CANNON AVENT GROUP, PLC, *et al.*

May 3, 2005, Decided
May 4, 2005, Filed

RULING

On February 2, 2005, Magistrate Judge James D. Kirk issued a Memorandum Order [Doc. No. 124] granting Defendants' Motion to Strike the Hakim Declaration [Doc. No. 108]. On February 22, 2005, Plaintiff filed a document entitled "Plaintiff's Objection to Magistrate Judge's Report and Recommendation [sic] that the Hakim Declaration Be Stricken," which the Court construes as an appeal [Doc. No. 128] of the Magistrate Judge's February 2, 2005 Memorandum Order. On March 9, 2005, Defendants filed a Response to Plaintiff's Request for Review of the Magistrate Judge's Memorandum Order.

Appendix I

For the following reasons, the Magistrate Judge's February 2, 2005 Memorandum Order [Doc. No. 124] is AFFIRMED, and Plaintiff's appeal [Doc. No. 128] is DENIED.

A magistrate judge's non-dispositive order is reviewable under the clearly erroneous and contrary to law standard. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *Castillo v. Frank*, 70 F.3d 382, 385-86 (5th Cir.1995).

In his Memorandum Order granting the Motion to Strike the Hakim Declaration, Magistrate Judge Kirk concluded that Hakim failed to provide a timely expert report or to submit himself for deposition, that expert testimony is not needed by the Court in this case, and that Hakim's testimony is self-serving, biased, and "of no assistance to the [C]ourt in understanding the 'technology' involved regarding the simple device at issue in this case."

In patent infringement suits, the Federal Circuit has admonished that "claims should preferably be interpreted without recourse to extrinsic evidence such as expert testimony . . . and that expert testimony should be received only for the purpose of educating the judge." *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 892 (Fed.Cir.1998). "In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such circumstances, it is improper to rely on extrinsic evidence." *C.P. Partnership v. Far West Products*, Civ. No. 6:97-1337, 1998 WL 998960 (W.D.La. Aug. 25, 1998) (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed.Cir.1996)). "In construing the claims

we look to the language of the claims, the specification, and the prosecution history. Extrinsic evidence *may* also be considered, *if needed* to assist in determining the meaning or scope of technical terms in the claims." *Pall Corp. v. Micron Separations, Inc.* 66 F.3d 1211, 1216 (Fed.Cir.1995) (emphasis added; citations omitted).

In the present case, Magistrate Judge Kirk determined that the consideration of extrinsic evidence such as the Hakim Declaration was not necessary to assist in construing the claims because the technology involved is relatively simple.

Having conducted a review of the entire record, including the memoranda submitted by Defendants and Plaintiff, the Court finds that, under the facts and circumstances of this case, the Magistrate Judge's ruling was not clearly erroneous or contrary to the law.

IT IS HEREBY ORDERED that Plaintiff's appeal [Doc. No. 128] is DENIED and the Magistrate Judge's February 2, 2005 Memorandum Order [Doc. No. 124] granting Defendants' Motion to Strike the Hakim Declaration is AFFIRMED.

MONROE, LOUISIANA, this 3 day of May, 2005.

ROBERT G. JAMES

UNITED STATES DISTRICT JUDGE

APPENDIX J — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

No. 02-1371

NOURI E. HAKIM,

v.

CANNON AVENT GROUP, PLC, *et al.*

February 2, 2005, Decided
February 2, 2005, Filed

MEMORANDUM ORDER

Before the court is defendant's motion to strike, Doc. # 108 the affidavit testimony of plaintiff in regard to the motions for summary judgment, Docs. # 88, 89, and 90, now before the court. Plaintiff, Hakim, has filed the affidavit in opposition to defendants' motions. Defendants move to strike because plaintiff was not designated as an expert witness and has failed to comply with the court's rules and with the FRCP requiring expert reports.

The motion is GRANTED.

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Hakim, while identifying himself as a potential witness who would give expert testimony, failed to provide a timely expert report or to submit himself to deposition. Further, as noted in the Reports and Recommendations concerning Doc. # 88 and 89, expert testimony is not needed by the court in this case. Hakim's testimony is self serving and, because he is a party is biased and of no assistance to the court in understanding the "technology" involved regarding the simple device at issue in this case. See FRE 701, 702 and this court's scheduling order issue in this case.

APPENDIX K — ILLUSTRATION OF FIGURES 9(D) AND 9(E) FROM '931 AND '620 PATENTS